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Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITIZENS' UTILITY RATEPAYER BOARD,

Petitioner,

v.

KANSAS PIPELINE PARTNERSHIP,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state violates the Fourteenth Amendment's due process guarantee when it statutorily provides parties a right to a hearing and then withdraws that right by allowing the matter to be determined by default caused by the inaction of a state agency, rather than on the merits?

LIST OF PARTIES REQUIRED PURSUANT TO RULE 14(b)

In addition to the parties set forth in the caption of this Petition, the following were parties to the proceeding in the court below:

Cities of Ottawa and Paola, Kansas
City of Overland Park, Kansas
Jefferson County, Kansas
Kansas Attorney General Carla Stovall
Kansas Corporation Commission
Miami Pipeline Company
Panhandle Eastern Pipeline Company
Western Resources, Inc.
Williams Natural Gas Company

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Citizens' Utility Ratepayer Board ("CURB"), seeks a writ of certiorari to review an order of the Supreme Court of the State of Kansas, denying review of an order of the Court of Appeals of the State of Kansas which held that the failure of the Corporation Commission of the State of Kansas ("KCC") to reach a decision on the merits of certain public utility applications within the 240-day period prescribed by Kan. Stat. Ann. § 66-117(b) forever barred Kansas ratepayers from having the applications considered on their merits.

OPINIONS BELOW

The unpublished opinion of the Supreme Court of the State of Kansas, entered September 9, 1996, is reprinted at Appendix A. The opinion of the Court of Appeals of the State of Kansas, entered May 17, 1996, is published as Kansas Pipeline Partnership v. State Corp. Comm'n, 916 P.2d 76 (Kan. Ct. App. 1996) and is reprinted at Appendix B.

JURISDICTION

The Supreme Court of the State of Kansas entered its order on September 9, 1996. This Petition for Writ of Certiorari is being docketed within ninety days from the entry of the order of the Supreme Court of the State of Kansas pursuant to Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (1993).

The provisions of 28 U.S.C. § 2403(b) may apply. The Attorney General of the State of Kansas and the Kansas Corporation Commission are being served with three copies of the Petition pursuant to Rule 29.4(c).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The specific text of the following constitutional and statutory authorities are included at Appendices G through I:

U.S. Const. amend. XIV
Kan. Stat. Ann. § 66-117 (1995)
Kan. Stat. Ann. § 66-1223 (1995)

STATEMENT OF THE CASE

This case involves an appeal from a decision of the KCC in which Kansas Pipeline Partnership ("KPP") sought approval of certain gas purchase and transportation contracts entered into with Western Resources, Inc. ("WRI"). Extensive hearings were conducted by the KCC over a period of several weeks. Prior to the technical hearings, comprehensive discovery was served by the applicants and intervenors, including KPP, KCC Staff, CURB, WRI and Williams Natural Gas Company ("WNG"). The contracts were opposed by KCC Staff, CURB, WNG and others.

At the conclusion of the technical hearings, the parties were ordered to file post-hearing briefs. Subsequently, KCC Staff filed for and was granted a stay of proceedings. The stay was granted because the Federal Energy Regulatory Commission ("FERC") had issued an order providing that FERC had jurisdiction over the subject contracts because KPP constituted an interstate pipeline.[1] The KCC ruled that the 240-day period within which the KCC was required to act on the subject contracts under Kan. Stat. Ann. § 66-117(b), to the extent applicable, was restarted in light of the FERC order.[2] Kan. Stat. Ann. § 66-117(b) is reprinted at Appendix H.

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[1]KansOk Partnership, Kansas Pipeline Partnership, & Riverside Pipeline Co., 73 FERC ¶ 61, 160 (1995).

[2]The KCC orders which provide the basis for the Lower Courts' decision are reprinted at Appendices C through F.

KPP appealed the KCC decision to the Court of Appeals of the State of Kansas. KPP argued on appeal that the contracts had gone into effect by operation of law since the KCC had not acted timely on the applications. The Court of Appeals held that the KCC had not acted on the subject applications within the 240-day period prescribed by Kan. Stat. Ann. § 66-117(b) and therefore, the contracts were deemed approved without any consideration of the merits of such contracts. Appendix B.

CURB first raised its constitutional due process arguments in its Petition for Review in the Supreme Court of the State of Kansas. Appendix J. The Kansas Supreme Court denied the Petition without considering the constitutional due process arguments in its September 9, 1996 order. Appendix A. The application of Kan. Stat. Ann. § 66-117(b) by the Lower Courts violates the fundamental due process rights of Kansas ratepayers. This Court should grant this Petition and restore these rights to the affected ratepayers.

REASONS FOR GRANTING THE WRIT

Summary of Argument

CURB represents the interests of residential and small commercial ratepayers in the State of Kansas. The five contracts which will go into effect by operation of law if the Lower Courts' decision is allowed to stand will be detrimental to these ratepayers. While CURB has been statutorily authorized to represent and protect the interests of such ratepayers, the actions of the Lower Courts effectively negate ratepayers' rights to notice and hearing on the contracts and subjects ratepayers to the increased costs

associated with the contracts through no fault of CURB or ratepayers. The inaction of the KCC should not cause unsuspecting ratepayers to be subject to these contracts for periods as long as twenty years. Procedural due process requires that CURB and its constituency be entitled to notice and a meaningful hearing on the disputed contracts. CURB and Kansas ratepayers are entitled to have the KCC consider the merits of the contracts.

I. KAN. STAT. ANN. § 66-117(b) AND ITS APPLICATION BY THE LOWER COURTS VIOLATE THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

A. CURB and the Ratepayers it Represents Are Entitled to Due Process of Law.

The decisions of the Lower Courts have denied CURB and the ratepayers its represents their statutory right to inquire into the propriety of the five gas purchase and transportation contracts the cost of which will ultimately be borne directly by such ratepayers. The application of Kan. Stat. Ann. § 66-117(b) by the Lower Courts has denied ratepayers their fundamental due process right to notice and a meaningful hearing on the contracts.[3]

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[3]The decisions of the Lower Courts reach beyond the Kansas borders. It will serve as authority for other states who have enacted comparable legislation. See, Minn. Stat. § 216B.16(2)(a) (1995); Mo. Ann. Stat. § 392.230(5) (Vernon 1996); S.C. Code Ann. § 58-5-240(E) (Law. Co-op. 1995); Tex. Corps. & Ass'ns Code Ann. §§ 2.212(d), 3.211(d), 5.08(d) (West 1995); Utah Code Ann. § 54-7-

The Fourteenth Amendment to the U.S. Constitution provides "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .". Appendix G. Due process requires, when liberty or property rights protected by the Fourteenth Amendment are involved, the right to a hearing prior to taking.[4] CURB and the ratepayers it represents have been precluded by the Lower Courts' application of Kan. Stat. Ann. § 66-117(b) from pursuing a meaningful hearing and have thus been deprived of a protected property interest specifically created by the Kansas legislature.

B. CURB and Kansas Ratepayers Have a Protected Property Interest.

CURB is a creature of statute and through its consumer counsel is specifically empowered under Kan. Stat. Ann. § 66-1223 to: (1) represent residential and small commercial ratepayers before the State Corporation Commission; (2) function as an official intervenor in cases filed with the State Corporation Commission, including rate increase requests; (3) initiate actions before the State Corporation Commission; (4) represent residential and commercial ratepayers who file formal utility complaints with the State Corporation Commission; (5) intervene in formal complaint cases which would affect ratepayers; and (6) make

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12(3)(c) (1996); Vt. Stat. Ann. tit. 30, § 227(a) (1996); Wis. Stat. § 196.19(d) (1994). Consequently, the decision is important from a national perspective.

[4]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

application for a rehearing or seek judicial review of any order or decision of the State Corporation Commission. Appendix I.

The obvious purpose of the authorizing legislation was to create an effective advocate for residential and small commercial ratepayers in utility proceedings before the KCC. CURB has been empowered statutorily to pursue causes on behalf of ratepayers whenever ratepayers would be adversely affected by a decision of the KCC. This authority to commence actions on behalf of ratepayers rises to the level of a protected property interest for ratepayers who otherwise would not have the financial resources to commence such actions on an individual basis.

Prior decisions from this Court have provided guidance as to the scope of protected property interests. The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." A cause of action is a species of property protected by the Fourteenth Amendment's due process clause.[5] The decisions of the Lower Courts have extinguished the statutory right of ratepayers to participate in the KCC proceedings without due process of law.

The deprivation here is particularly egregious when one considers that CURB's statutory right to pursue causes of action on behalf of ratepayers is abrogated through no fault of CURB or the ratepayers it represents. The Lower Courts failed to recognize that it is ratepayers and not the KCC who

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[5]Mullane, 339 U.S. at 311; Logan v. Zimmerman Brush Co., et al., 455 U.S. 422, 428 (1982).

ultimately will suffer the consequences of the contracts if allowed to go into effect. The Lower Courts' actions deprive CURB of the right to challenge the need and propriety of the contracts. Kan. Stat. Ann. § 66-117(b) and its application by the Lower Courts results in constitutional harm being inflicted on innocent ratepayers. The unconstitutional deprivation of fundamental due process rights resulting from the Lower Courts' decisions should be remedied by this Court.

C. Due Process Dictates that CURB Be Allowed a Meaningful Hearing on the Disputed Contracts.

Property rights once conferred by the legislature cannot be withdrawn without due process of law. The Fourteenth Amendment requires as a matter of due process an opportunity to be heard granted at a meaningful time and in a meaningful manner.[6] While the legislature may elect not to confer a property interest, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. The adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.[7]

CURB and its constituency were deprived of their statutory right to intervene and participate in an administrative proceeding conducted solely for the purpose of determining the prudency of certain gas contracts the burden

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[6]Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

[7]Vitek v. Jones, 445 U.S. 480, 490-491, n. 6 (1980).

of which falls on ratepayers. The Lower Courts' endorsement of Kan. Stat. Ann. § 66-117(b) deprives ratepayers of a property interest without due process of law. Some form of hearing is required before the owner of the property interest is finally deprived of such interest.[8]

In Logan v. Zimmerman Brush Co., et al., 455 U.S. 422 (1982), this Court held that a state may not terminate a complaining party's cause of action because a state official, for reasons beyond the complaining party's control, failed to comply with a statutorily mandated procedure. In Logan, the complaining party brought an employment-related claim under the Illinois Fair Employment Practices Act. That Act provided that the Illinois Fair Employment Practices Commission had 120 days within which to convene a fact finding conference designed to obtain evidence, ascertain the position of the parties, and explore the possibility of a negotiated settlement. It was discovered that the conference had inadvertently been scheduled after the expiration of the 120-day period. The complaining party's cause of action was dismissed by the Lower Court. The 120-day period was deemed to be jurisdictional by the Lower Court.

Citing Mullane, the Logan Court held that the complaining party's cause of action was a property interest protected by the Fourteenth Amendment. The Logan Court held that the complaining party was entitled to an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Since the complaining party was denied that opportunity, the Court reversed. It was determined by the Court that the

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[8]Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

complaining party was entitled to have his complaint considered on its merits.

This case presents facts remarkably similar to those in Logan. Here the legislature created a statutory cause of action through CURB to protect and advance the interests of residential and small commercial ratepayers. CURB initiated such an action by intervening in the proceeding before the KCC. Ratepayers' rights to have a determination on the merits of the case were then removed by the Lower Courts, not because of any action of CURB, but by the inaction of the KCC to decide the case within the arbitrary period specified by Kan. Stat. Ann. § 66-117(b). The decision of the Lower Courts effectively denies ratepayers their cause of action without due process of law. There is no meaningful distinction between the cause of action at issue in Logan and the ratepayers' right to use the adjudicatory procedures before the KCC to challenge the propriety of the five gas purchase and transportation contacts.

CONCLUSION

Kan. Stat. Ann. § 66-117(b) is unconstitutional because it denies ratepayers their constitutional right to notice and a meaningful hearing. This Court should grant CURB's Petition and, like the Logan Court, determine that ratepayers' right to use the KCC adjudicatory process is a species of

property protected by the Due Process Clause. CURB is entitled to have the KCC consider the merits of the disputed contracts.

Respectfully submitted,

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